

RHB Bank Berhad v Fauzun bin Abdul Samad

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3-22-653 OF 1996
ABDUL ALIM ABDULLAH JC
15 JUNE 2007

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Banking — Banks and banking business — Loan Agreement — Breach of terms of loan agreement — Failure of defendant to make monthly repayments — Whether there had been a prior demand on the defendant for the repayment of the loan before proceeding to file action

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Banking — Banks and banking business — Loan Agreement — Whether there was a termination of a facility agreement and an issuance of a letter of demand

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Contract — Breach — Termination — Whether notice of termination essential in the agreement

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The plaintiff bank had granted the defendant a term loan facility ('the Facility') and the plaintiff made full payment of the facility after a drawdown notice by the defendant. The defendant breached the terms of the Facility when he failed to make the monthly repayments, and the plaintiff's solicitors issued a letter of demand against the defendant. The main issues before the Court were, prior to the expiry of the facility, whether the plaintiff must first terminate the facility before being entitled to claim for payment, and whether the plaintiff's suit was premature when it filed its suit without having first terminated the facility.

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Held:

- (1) Before the plaintiff is entitled to the amount claimed, the provisions of s 12.02 of the Facility Agreement required the plaintiff to terminate the facility and to serve a written notice of demand on the defendant. The Court found no evidence that there had been a demand made and neither was there evidence of termination of the facility (see paras 12, 13)
- (2) The Court dismissed the argument that there was no need for termination of the Facility as the drawdown was in a lump sum as opposed to disbursements in stages. The Facility Agreement made no such distinction between a default in both situations (see para 14).
- (3) The Facility Agreement also made it plain that notice was essential in determining the agreement. There were precise and explicit provisions as to the requirement as to the giving of notices of termination and demand (see para 16).

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A [Bahasa Malaysia summary]

- B** Bank plaintif telah memberikan defendan satu kemudahan pinjaman bertempoh ('kemudahan') dan plaintif telah membuat bayaran penuh kepada kemudahan selepas notis pengeluaran kepada defendan. Defendan telah melanggar terma-terma kemudahan dan beliau gagal untuk membuat pembayaran bulanan, dan peguamcara plaintif telah mengeluarkan satu surat tuntutan terhadap defendan. Isu-isu utama di hadapan mahkamah adalah, sebelum luputnya kemudahan, sama ada plaintif mesti menamatkan kemudahan sebelum berhak menuntut bayaran, dan sama ada guaman plaintif adalah pra-matang bila ianya difailkan tanpa menamatkan dahulu kemudahan.
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Diputuskan:

- D** (1) Sebelum plaintif berhak kepada jumlah yang dituntut, peruntukkan s 12.02 Perjanjian Kemudahan memerlukan plaintif untuk menamatkan kemudahan dan menyerahkan notis tuntutan bertulis kepada defendan. Mahkamah mendapati tiada bukti terdapat tuntutan dibuat dan tiada bukti berkaitan penamatan kemudahan (perenggan 10)
- E** (2) Mahkamah menolak pertikaian bahawa tidak perlu untuk menamatkan kemudahan memandangkan pengeluaran adalah sekali gus tidak seperti pengeluaran berperingkat. Perjanjian kemudahan tidak membuat sebarang perbandingan antara keingkaran untuk kedua-dua situasi (perenggan 11).
- F** (3) Perjanjian kemudahan juga menjadikannya jelas bahawa notis adalah penting dalam menentukan perjanjian. Terdapat peruntukkan tepat dan terang kepada keperluan memberikan notis-notis penamatan dan tuntutan (perenggan 11).]

Notes

- G** For cases on loan agreement, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1985–1987.
For the case on termination of notices, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2376.

Cases referred to

- H** *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd* [1991] 1 CLJ 522 (dist)
Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610 (refd)
North Central Wagon & Finance Co Ltd v Graham [1950] 1 All ER 781 (dist) (dist)
- I** *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155 (refd)
Public Bank v Chan Siok Lie & Ors [1989] 2 MLJ 305 (dist) (dist)
Harjinder Kaur (Sharizat Rashid & Lee) for the plaintiff.
Haris Ibrahim, Sunil Lopez (Haris & Co) for the defendant.

Abdul Alim Abdullah JC:

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[1] The plaintiff is a financial institution that had granted the defendant, at the latter's request, a term loan facility ('the Facility') in the sum of RM2,000,000. The letter of offer dated 14 September 1993 addressed to the defendant is at pp 1 to 7 of the Agreed Bundle of Documents (refer ABD pp 1–7). A Facility Agreement between the parties was formalised between them (refer ABD pp 8–47).

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[2] The plaintiff made full payment of the facility on 12 October 1993 after a drawdown notice dated 22 September 1993 was issued by the defendant. The plaintiff contends in para 6 of its statement of claim that the defendant breached the terms of the Facility Agreement when he failed to make the monthly repayments. A letter of demand dated 6 June 1996 was issued by the plaintiff's solicitors to the defendant claiming RM2,280,332.81 together with interest (refer para 7 of the statement of claim).

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[3] The issues called into question before this Court are set out as follows:

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- (a) whether the plaintiff, prior to the expiry of the Facility, must first terminate the Facility so as to be entitled to payment by the defendant of the amount claimed.
- (b) whether the plaintiff had terminated the Facility by issuing the defendant a written notice in accordance with the terms of the Facility Agreement.
- (c) whether the plaintiff was, when it filed this suit on 26 September 1996 entitled to the amount claimed before the expiry of the Facility without having first issued a written notice to the defendant to terminate the Facility, in other words, whether the plaintiff's suit is premature.

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[4] It is worthwhile to note the salient provisions of the Facility Agreement. It will make easy, a fortiori, a better understanding of the respective legal contractual positions of the parties herein. The relevant clauses are set out below:

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Section 3.02 Tenure

The facility hereby granted by the Bank shall be for a maximum period of three years or thirty six months from the date of first drawdown [refer ABD p 14].

Section 12.01 Events of Default

The Bank may, by written notice to the Borrower terminate the facility whereupon the principal, interest and all other sums payable by the Borrower under this Agreement shall be repaid or paid to the Bank within fourteen days of the notice upon the occurrence of any of the following events:

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- (a) if the Borrower fails to pay any sum due under this Agreement on the due date; or [refer ABD pp 28–30]

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Section 12.02 Repayable on Demand

Notwithstanding anything to the contrary herein contained, the Bank shall have the right to terminate the facility and upon such termination, such undrawn portion of the facility or any part thereof shall be treated as cancelled, and the Bank shall further

- A be entitled thereafter by notice in writing to the Borrower to declare that the facility and all other sums payable pursuant to this Agreement have become immediately due and payable and the Borrower shall immediately pay the same to the Bank [refer ABD p 30].

Section 18.01 Notices

- B (a) Any demand for the payment of the monies covenanted herein to be paid by the Borrower and any notice or request required or permitted to be given or made under this Agreement to the Bank or to the Borrower shall be in writing and in the case of the Bank shall be under the hand of a Manager or Officer of the Bank or a solicitor or firm of solicitors purporting to act for the Bank to the addresses specified below:
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For the Bank: Rakyat Merchant Bankers Berhad 9th Floor, Bangunan Angkasaraya Jalan Ampang, P.O. Box 12346 50450 Kuala Lumpur. For the Borrower: Fauzun Bin Abdul Samad [NRIC NO: 3866802] Periklanan LKPP Fort Sdn Bhd Suite 2, Tingkat 11, Kompleks Teruntum Jalan Mahkota 25000 Kuantan Pahang.

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- (b) Any such demand notice or request shall be deemed to have been sufficiently given or made if sent by ordinary/registered post, telex, telegram, cable or telefax and addressed as aforesaid or at the respective last known addresses or at telex number as may from time to time be notified by the Borrower or the Bank [as the case may be] and shall be deemed to have been served on and duly received by the other party in respect of delivery by hand, at the time of such delivery, and if by registered or by ordinary mail it shall be deemed to have been given upon the expiry of five days after the mail, if sent by cable or telegram the notice shall be deemed to be given upon the expiry of 24 hours and any notice or request sent by telex or telefax shall be deemed to be given at the time of the transmission and such notices shall be subsequently confirmed by letter posted or delivered as soon as practicable thereafter. [refer ABD pp 42–43]
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- G [5] The tenure of the facility is 3 years from the date of drawdown which is 12 October 1993 (according to PW1), its expiry being 11 October 1996. As clearly stated pursuant to s 12.01 of the Facility Agreement, the defendant maintains simply that prior to the expiry of the facility the plaintiff would only be entitled to the amount claimed if the plaintiff had first terminated it in compliance with the said s 12.01 (see para 4 above for the terms therein).
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- [6] There is no dispute that the defendant has failed to pay the amount due under the facility on its due date. There is also no issue that the plaintiff is entitled to terminate the Facility and demand the amount outstanding from the defendant during the tenure of the facility. It is the contention of the plaintiff that such a demand and termination is not a pre-requisite to commencing a suit as it is by itself to be construed to be a demand or termination of the facility.
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[7] PW1 in giving evidence claimed that the plaintiff had sent the defendant a demand letter dated 17 January 1995 (P4) demanding RM2,052,790.74. He also

says that the plaintiff's solicitors had sent a letter of termination and demand (P5) for the amount of RM2,088,060.28. Under cross-examination, PW1 was straightforward enough to admit that not only did he not have personal knowledge about the matter but also that there is no documentary evidence as to whether P4 and P5 were ever sent to the defendant. PW1 was also courageous in testifying further that the plaintiff's solicitors had similarly sent a letter of demand dated 16 June 1996 (P13) for the amount of RM2,280,332.81. In like manner, under cross-examination PW1 confessed that similarly there is no evidence that it was ever sent to the defendant.

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[8] To this end, can one say that there had been in fact evidence that a demand and termination of the facility had been communicated to the defendant. It would be ludicrous for one to say so. PW1's claim appears to be absurdly fanciful as it stood unsupported. It is no wonder that the plaintiff in its statement of claim makes no mention of a termination of the Facility.

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[9] Counsel for the plaintiff argued that there is no general rule that in all cases a prior precise demand is a *sine qua non* to the commencing of an action. Counsel relied on the authority of *Public Bank v Chan Siok Lie & Ors* [1989] 2 MLJ 305 (a decision of Shankar J as he then was) for the above proposition and the ratio that the writ itself is a notice. As against this, one needs to only refer to a decision of *Orang Kama Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Berhad* [1989] 3 MLJ 155. The latter case was decided by the High Court at first instance by the same learned judge in *Public Bank* which found no favour on appeal to the Supreme Court then. At p 157, the Supreme Court observed as follows:

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We are unable to agree with the views of the learned judge in this case that no antecedent demand was required to create a cause of action and the mere filing of the writ and service thereof was a sufficient demand obliging the third defendant to pay. Here the letter of guarantee is clear. A proper demand must be made. It is condition precedent to establishing a claim against a guarantor (Emphasis added)

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[10] It is also worthwhile to note that the Supreme Court in the oft-cited case of *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 had decided:

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Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor (Emphasis added).

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[11] Now, what is conspicuous yet remarkable in the present case is the relevant provision in s 12.02 of the Facility Agreement (see para 4 above for the terms therein).

[12] The terms therein obviously speak plainly of the conditions, namely that before the plaintiff is entitled to the amount claimed, it is required to:

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- (i) terminate the Facility, and
- (ii) serve a written notice of demand to the defendant.

A [13] Counsel for the plaintiff also volunteered a subtle argument that there was no need for the termination of the facility as the drawdown was in a lump sum as opposed to disbursements in stages. Upon a scrutiny of s 12.01 of the Facility Agreement there appears to be no such distinction between a default in a situation where there had been a lump sum drawdown and one where disbursements had been made (see para [4] above for the terms therein).

B [14] The authority of *Fui Lian Credit & Leasing Sdn Bhd v Kim Leona Timber Sdn Bhd & Ors* [1991] 1 CLJ 522 which was relied upon by counsel for the plaintiff nevertheless makes it plain that if required by the agreement, notice is essential in determining an agreement. Chong Siew Fai J (as he then was) said at p 525:

C Whilst it is true that there is no evidence of the plaintiff giving notice determining the agreement, in the absence of statutory requirement, such notice is, in my view, not essential and the plaintiff was not obliged to give notice of termination to the lessee unless so required by the agreement (Emphasis added).

D [15] Yet another authority relied upon by counsel for the plaintiff, but which does not in fact warrant an argument in his favour, is *North Central Wagon & Finance Co Ltd v Graham* [1950] 1 All ER 781. Reading this case it would appear that the Court of Appeal there had construed the hire purchase agreement in relation to what the law would be in the absence of an express provision, wherein the said cl 7(i) of the agreement did not require notice as a condition precedent to the exercise by the plaintiffs of their right to terminate the hire. In the present case before me there are precise and explicit provisions as to the requirement as to the giving of notices of termination and demand (undeniably in plain sight of s 12.02 of the Facility Agreementreferred above).

E [16] Hence, the clear and unchallenged evidence at the conclusion of the trial that bears certainty is that the letters in P5 and P13 had never ever been served on the defendant as expressly required by the Facility Agreement, let alone any evidence that they were even posted. The plaintiff's case fails at the threshold and hence is flawed in its entirety and shall stand dismissed with costs.

G *Plaintiff's claim dismissed with costs.*

H Reported by Lee Shih

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